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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

DONNA CORBELLO, an individual

Plaintiff,

V.

THOMAS GAETANO DEVITO, an individual, et al.

#### Defendants.

CASE NO.: 2:08-cv-00867-RCJ-PAL

**MOTION NO. 3: MOTION BY  
DEFENDANTS VALLI, GAUDIO,  
DSHT AND DODGER  
THEATRICALS TO DISMISS  
COUNTS 13 AND 14 OF  
PLAINTIFF'S SECOND AMENDED  
COMPLAINT UNDER RULE  
12(b)(6); MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

**[Oral Argument Requested]**

Courtroom: The Honorable  
Robert C. Jones

1 Defendants Frankie Valli, Robert J. Gaudio, DSHT, Inc. and Dodger  
2 Theatricals, Ltd. move for an Order dismissing Counts 13 and 14 of Plaintiff's Second  
3 Amended Complaint ("SAC") pursuant to Federal Rule of Civil Procedure 12(b)(6).  
4 The ground for the Motion to Dismiss Counts 13 and 14 for alternative declaratory  
5 relief and an accounting is that such counts are necessarily based on the assumption  
6 that a document executed on August 13, 1999 between and amongst Nick Maciocci,  
7 Thomas DeVito, Robert Gaudio and Frankie Valli constitutes an assignment of  
8 copyright ownership but, contrary to Plaintiff's assumption, that document, on its  
9 face, does not transfer any copyright ownership interest.

10 This motion is based upon the following Memorandum of Points and  
11 Authorities, the records and files in this action and such oral argument (hereby  
12 requested) as the Court may deem necessary and proper.  
13

14 DATED: April 23, 2009

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28 and JB VIVA VEGAS, L.P.

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## **MEMORANDUM OF POINTS AND AUTHORITIES**

## I. INTRODUCTION

In Motion to Dismiss No. 1, the New Defendants seek dismissal of Counts 15-17 for U.S. copyright infringement on the ground that any infringement claim arising out of the copyrighted work, “Tommy DeVito: Then and Now” (the “Autobiography”) has been waived and released by Tommy DeVito, whom Plaintiff alleges is a co-owner of the copyright.

In Motion to Dismiss No. 2, defendants Eric Elice and Marshall Brickman (the co-writers of JERSEY BOYS), Des McAnuff (the director of JERSEY BOYS), and Dodger Theatricals, Ltd., DSHT, Inc. and JB Viva Vegas, L.P. (producers of JERSEY BOYS) seek dismissal of Plaintiff's copyright infringement claims under U.S. law on the ground that no copyrightable portions of the Autobiography were used in JERSEY BOYS.

In this Motion to Dismiss No. 3, defendants Frankie Valli, Robert Gaudio, DSHT, Inc. and Dodger Theatricals seek dismissal of Counts 13-14, the non-copyright infringement claims for alternative declaratory relief and an accounting, which were only brought against those defendants.

The Autobiography at issue in this case was registered for U.S. Copyright in 1991 by defendant Tommy DeVito, an original member of singing group, The Four Seasons, who claimed to be its sole author. Rex Woodard, a fan of The Four Seasons who died in 1991, claimed to be a co-author and co-owner of the Autobiography. Second Amended Complaint (“SAC”) ¶¶ 26-35, 41, 74 & Ex. 21.

About a decade after the Autobiography was created, it remained unpublished as interest in The Four Seasons had waned during the 1990s. *Id.*, ¶ 37. Nevertheless, the star and the main songwriter of The Four Seasons, Frankie Valli and Bob Gaudio, respectively, had continued their efforts to produce a musical stage play about the group.

In August 13, 1999, Gaudio and Valli entered into a Letter Agreement with DeVito and Rick Maciocci, aka Nick Massi, the two other original members of the group (the “1999 Letter Agreement”).<sup>1</sup> This document provided for a grant of life story rights from DeVito and Massi for use in a Four Seasons-related musical, an agreement by DeVito and Massi to cooperate in the creation of such a musical and an express waiver and release of all claims that could arise in conjunction with such a musical.

As expressly contemplated in the 1999 Letter Agreement, Gaudio and Valli subsequently entered into other agreements including a May 1, 2004 agreement with DSHT, Inc. and Dodger Theatricals Ltd., through which the musical JERSEY BOYS about The Four Seasons was produced and distributed. SAC ¶¶ 56-57.

Plaintiff's lawsuit alleges that JERSEY BOYS copied from the Autobiography without her authorization. On February 27, 2009, Plaintiff filed a Second Amended Complaint alleging various claims against Defendant DeVito, including breach of contract, fraud and conversion. The Second Amended Complaint also alleges various claims against defendants Gaudio, Valli, DSHT, Dodger Theatricals, Elice, Brickman, McAnuff and the producing entity of the JERSEY BOYS production in Las Vegas, JB Viva Vegas, LP.

Based on a claim (contested) that Woodard was a co-author of the Autobiography, and on the allegation that JERSEY BOYS copied the Autobiography, the plaintiff, Donna Corbello, Woodard's widow, alleges in her Second Amended Complaint two alternative theories for recovery. Either: (1) the 1999 Letter Agreement must be viewed as an attempt by DeVito to transfer to Gaudio/Valli exclusive rights (i.e., 100% of the rights) in the copyright in the Autobiography, which

<sup>1</sup> The 1999 Letter Agreement was attached to the SAC as Exhibit 31, pages 38-41. For the Court's convenient reference, the 1999 Letter Agreement is also attached hereto as Exhibit A.

Plaintiff asserts DeVito could not effectively transfer because of Plaintiff's claim that DeVito only owned 50% of the copyright, and thus the transfer was *void ab initio*; or (2) in the alternative, the 1999 Letter Agreement constituted an "assignment" to Gaudio/Valli of all of DeVito's ownership interest (according to Plaintiff, 50%) in the Autobiography, making Gaudio/Valli 50% co-owners in the Autobiography with Plaintiff owning the remaining 50% interest -- assuming Plaintiff is a co-owner of the rights in the licensed Autobiography -- and entitling Plaintiff to an accounting of all proceeds from the Autobiography, including from JERSEY BOYS.<sup>2</sup>

Thus, the viability of Plaintiff's claims depends entirely on the effect of the 1999 Letter Agreement. If that writing did, in fact, assign or transfer DeVito's 50% share of the copyright in the Autobiography, then Plaintiff's copyright infringement claims all fail because the New Defendants would be 50% owners of the copyright and own the right and license to copy and use the Autobiography in whatever manner they wished.<sup>3</sup> If, on the other hand, the 1999 Letter Agreement did not, in fact, constitute an assignment or exclusive license of DeVito's 50% ownership interest in the copyright in the Autobiography, then Plaintiff's non-copyright claims (Counts 13 and 14 for Declaratory Relief and an Accounting, respectively), must fail because they necessarily depend on a showing that Plaintiff is a 50% co-owner of the rights in the Autobiography with Gaudio/Valli and/or DSHT/Dodger. In her Counts 13 and 14, Plaintiff is effectively making the startling contention that, with regard to the

<sup>2</sup> The Second Amended Complaint is the first pleading to allege a count for alternative declaratory relief relating to the contention that the 1999 Letter Agreement constituted an assignment of DeVito's copyright and to allege an accounting claim against defendants DSHT and Dodger Theatricals. These are the counts that are the subject of this Motion to Dismiss.

<sup>3</sup> See *McKay v. Columbia Broadcasting System, Inc.*, 324 F.2d 762, 763 (2<sup>nd</sup> Cir. 1963) (“[A] license from a co-holder of a copyright immunizes the licensee from liability to the other co-holder for copyright infringement.”); *Ondo v. Ries*, 743 F.2d 630, 632-33 (9<sup>th</sup> Cir. 1984) (“A co-owner of a copyright cannot be liable to another co-owner for infringement of the copyright.”).

1 Autobiography, she is a 50%-50% partner with Gaudio/Valli and/or DSHT/Dodger,  
 2 persons whom she has never met and with whom she has never done business.

3 This motion demonstrates that, as a matter of law, the 1999 Letter Agreement  
 4 cannot constitute an assignment or exclusive license of DeVito's ownership interest in  
 5 the Autobiography, and that Plaintiff's 13<sup>th</sup> and 14<sup>th</sup> Counts therefore must be  
 6 dismissed.

7

8 **II. PLAINTIFF'S ALTERNATIVE CLAIMS FOR DECLARATORY**  
 9 **RELIEF (COUNT 13) AND FOR AN ACCOUNTING (COUNT 14)**  
 10 **CANNOT STATE A CLAIM BECAUSE THEY ARE PREMISED ON AN**  
 11 **ASSIGNMENT OF COPYRIGHT THAT DOES NOT EXIST**

12 Count 13 of the SAC seeks a declaration that the 1999 Letter Agreement  
 13 constituted an assignment of DeVito's copyright interest in the Autobiography.  
 14 Plaintiff alleges that such document transferred to Gaudio and Valli 100% of DeVito's  
 15 50% co-ownership interest in the copyright to the Autobiography, and that Plaintiff,  
 16 the putative co-owner of 50% of the copyright to the Autobiography, became a co-  
 17 owner of the Autobiography with Gaudio and Valli. Count 13 further alleges that  
 18 Gaudio and Valli subsequently licensed the Autobiography to Defendants DSHT and  
 19 Dodger, resulting in Plaintiff becoming a co-owner of the Autobiography with DSHT  
 20 and Dodger. SAC ¶¶ 185-187.

21 Similarly, Plaintiff's 14<sup>th</sup> Count alleges that she has the right to an equitable  
 22 accounting from Defendants Gaudio, Valli, DSHT and Dodger of their revenues from  
 23 JERSEY BOYS and auxiliary works because all of those works were based on the  
 24 Autobiography, of which Plaintiff is allegedly a co-owner with Gaudio/Valli and/or  
 25 DSHT/ Dodger. *Id.* ¶¶ 188 - 197.

26 Thus, Plaintiff's claim in Counts 13 and 14 that Defendants Gaudio, Valli,  
 27 DSHT and Dodger are co-owners (with Plaintiff) of the Autobiography necessarily  
 28 depends on the threshold allegation that the 1999 Letter Agreement assigned the

1       entirety of DeVito's copyright interest in the Autobiography to Valli and Gaudio.

2  
3       But, as a matter of law, that allegation is without merit. It is flatly contradicted  
4 by the terms of the 1999 Letter Agreement that is attached to and made part of the  
5 SAC including Counts 13 and 14. SAC ¶¶ 185, 190. *See Marder v. Lopez*, 450 F.3d  
6 445, 448 (9<sup>th</sup> Cir. 2006) ("A court may consider evidence on which the complaint  
7 'necessarily relies' if (1) the complaint refers to the document; (2) the document is  
8 central to the plaintiff's claim; and (3) no party questions the authenticity of the copy  
9 attached to the 12(b)(6) motion."); *Ernestberg v. Mortgage Investors Group*,  
10       F.Supp.2d \_\_, 2009 WL 160241, \*3 (D.Nev. Jan. 22, 2009) ("[D]ocuments whose  
11 contents are alleged in a complaint and whose authenticity no party questions, . . . may  
12 be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the  
13 motion to dismiss into a motion for summary judgment). As such, Plaintiff's Counts  
14 13 and 14 should be dismissed under Rule 12(b)(6). *Marder v. Lopez, supra*  
15 (affirming motion to dismiss plaintiff's claims for a declaration of her rights as an  
16 alleged co-owner of the copyright to a motion picture and for an accounting of motion  
17 picture revenues when such claims were contradicted by a release referenced in  
18 plaintiff's complaint.); *Konigsberg International, Inc. v. Rice*, 16 F.3d 356 (9<sup>th</sup> Cir.  
19 1994) (deciding invalidity of purported copyright assignment on motion to dismiss).

20       A.     **The Copyright Act Requires an Assignment of Copyright to be**  
21                   **Expressly Conveyed in Writing**

22       Section 204(a) of the Copyright Act of 1976 provides that any "transfer of  
23 copyright ownership" other than by operation of law (such as pursuant to a  
24 bankruptcy), must be made in the form of a "writing . . . signed by the owner of the  
25 rights conveyed. . ." 17 U.S.C. § 204(a). The term "transfer of copyright" is defined  
26 as an "assignment, mortgage, exclusive license" or any other conveyance of an  
27 exclusive copyright right, but not including a "non-exclusive license." 17 U.S.C. §  
28 101.

1           The Ninth Circuit has explained that Section 204's writing requirement is  
 2 "really quite simple: If the copyright holder agrees to transfer ownership to another  
 3 party, that party must get the copyright holder to sign a piece of paper saying so."  
 4 *Effects Associates, Inc. v. Cohen*, 908 F.2d 555, 557 (9<sup>th</sup> Cir. 1990) (Kozinski, J.).  
 5 Chief Judge Kozinski later elaborated that although the writing need not be lengthy or  
 6 complex, it must reflect the true intention of the parties to actually transfer copyright  
 7 ownership. *Konigsberg v. Rice*, 16 F.3d at 357 (letter signed by defendant referring to  
 8 a contract between the parties might have satisfied the statute of frauds but did not  
 9 transfer copyright ownership because there was no meeting of the minds to so transfer  
 10 rights).

11          Other courts have agreed that the writing requirement may only be met by a  
 12 document that is intended to convey ownership of a copyright or an exclusive right in  
 13 a copyright. Thus, there was no assignment where the writing did not refer to the  
 14 domain of copyright ownership but rather to other interests such as the right to record  
 15 compositions (*Pamfiloff v. Giant Records, Inc.* 794 F.Supp. 933, 935 (N.D.Cal. 1992))  
 16 or the transfer of breach of contract claims (*Bieg v. Hovnanian Enterprises, Inc.*, 157  
 17 F.Supp.2d 475, 480-82 (E.D. Pa. 2001). *See also Lyrick Studios, Inc. v. Big Idea  
 18 Productions, Inc.*, 420 F.3d 388, 392 (5<sup>th</sup> Cir. 2005) (to satisfy Section 204(a), the  
 19 writing "must... show an agreement to transfer copyright."); *Foraste v. Brown  
 20 University*, 290 F.Supp.2d 234, 240 (D.R.I. 2003) (writing held insufficient to transfer  
 21 copyright ownership given that it "fails to make any reference at all to the subject  
 22 matter of the rights to be transferred....").

23          B.     **The 1999 Letter Agreement, On Its Face, Cannot Satisfy Section  
 24 204's Writing Requirement**

25          Plaintiff's Counts 13 and 14 allege and assume that the 1999 Letter Agreement  
 26 constitutes an assignment or exclusive license of 100% of DeVito's 50% copyright  
 27 ownership interest in the written manuscript that Plaintiff alleges was co-authored by  
 28 Rex Woodward and DeVito a decade earlier. SAC ¶¶ 54 and 81, incorporated by

1 reference into Counts 13 and 14.

2  
3 But the 1999 Letter Agreement is not described as an “Assignment” or a  
4 “License”; it never uses the words “assignment” or “license”; it does not refer to  
5 DeVito (or Massi) as an “assignor” or “licensor” nor to Gaudio and/or Valli as an  
6 “assignee” or “licensee”; it does not identify any copyrighted work, let alone an  
7 unpublished 1988-91 manuscript that is authored by DeVito and/or Woodard; and it  
8 makes no reference to DeVito’s sole or partial ownership of the copyright in the  
9 Autobiography. *See* SAC, Ex. 31. Nothing in the 1999 Letter Agreement states or  
10 suggests that Gaudio and Valli even knew of the existence of the Autobiography at the  
11 time they entered into the Letter Agreement in 1999.

12 The language of the 1999 Letter Agreement also reveals the lack of any intent  
13 by the parties to convey any copyright ownership interest of DeVito to Gaudio and  
14 Valli. Moreover, although Paragraph 81 of the Second Amended Complaint alleges  
15 that DeVito intended in the 1999 Letter Agreement to assign or exclusively license all  
16 of his rights in the Autobiography, DeVito’s Answer denies any such intention.  
17 DeVito’s Answer to Second Amended Complaint ¶ 81, filed March 11, 2009.  
18 Similarly, Gaudio and Valli disclaim any intent to acquire through the 1999 Letter  
19 Agreement any assignment of or exclusive license to the Autobiography. New  
20 Defendants’ Answer to First Amended Complaint ¶ 76, filed October 31, 2008.<sup>4</sup>

21 Where, as here: (1) the purported assignor (DeVito) did not even intend to  
22 assign away his copyright ownership rights, and (2) the purported assignees (Gaudio  
23 and Valli) disclaim any intent to acquire copyright ownership of any Autobiography,  
24 then a person not even a party to the purported assignment (plaintiff) cannot be heard  
25 to assert that the document in question nevertheless worked an involuntary

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26  
27       <sup>4</sup> While Gaudio and Valli have not yet answered the SAC, their position on the  
28 1999 Letter Agreement will remain the same.

1 assignment. *See Effects Associates*, 908 F.2d at 557 (“Section 204 ensures that the  
 2 creator of a work will not give away his copyright inadvertently and forces a party  
 3 who wants to use the copyrighted work to negotiate with the creator to determine  
 4 precisely what rights are being transferred and at what price.”); *Pamfiloff*, 794 F.Supp.  
 5 at 937 (“[W]e understand the policy underlying Section 204(a) to be tipped in favor of  
 6 the original holder of the copyrighted material” and away from a transfer of ownership  
 7 interests unless the transfer is “clearly documented.”); *Bieg v. Hovnanian Enterprises*,  
 8 157 F.Supp.2d. at 480 (“[A]ny ambiguity in the transferred document must be  
 9 construed in favor of the original copyright holder in order to avoid such inadvertent  
 10 transfers.”).

11 Simply put, the 1999 Letter Agreement, on its face, was not intended to and  
 12 cannot reasonably be construed to effectuate a transfer of 100% of DeVito’s alleged  
 13 50% interest in the copyright to an unidentified, decade-old manuscript of which  
 14 Gaudio and Valli were not even aware. Because the 1999 Letter Agreement cannot,  
 15 as a matter of law, constitute the writing that is required under the Copyright Act of  
 16 1976 to effectuate an assignment of DeVito’s copyright interest in the Autobiography,  
 17 Plaintiff’s Counts 13 and 14, which depend on a valid assignment, do not state a valid  
 18 claim and must be dismissed.<sup>5</sup>

19 New Defendants anticipate that Plaintiff may point to the language in the 1999  
 20 Letter Agreement that DeVito and Massi “grant. . . .the exclusive right to use and  
 21 incorporate the Materials” in a musical stage play based on the life and music of The  
 22 Four Seasons musical group. But “Materials” is a defined term in the 1999 Letter  
 23 Agreement referring to the life story rights that DeVito and Massi were conveying to

24

25       <sup>5</sup> Although the 1999 Letter Agreement does not satisfy the requirements  
 26 for an assignment of copyright ownership under Section 204, it does support a finding  
 27 that DeVito consented to the use of the Autobiography in the creation and exploitation  
 28 of the musical that ultimately became JERSEY BOYS. As a result, the 1999 Letter  
 Agreement constitutes an implied non-exclusive license to use the Autobiography.  
*See Effects Associates*, 908 F.2d at 555-59 (where copyright assignment fails under  
 Section 204, court can find an implied non-exclusive license, which does not require a  
 writing). *See* New Defendants’ Motion to Dismiss No. 1.

1 Gaudio and Valli so that Gaudio and Valli could proceed to authorize the creation of a  
 2 musical about The Four Seasons and ancillary Works (collectively, the "Works"),  
 3 which Works would portray each of the four principal members of the group: "The  
 4 authors of the play may wish to use or incorporate certain aspects of your life related  
 5 to The Four Seasons including, by way of example, your creative contributions,  
 6 biographies, events in your life, names and likenesses (the 'Materials')." The  
 7 document also requires DeVito and Massi to "make yourselves available for such  
 8 interviews by the bookwriters. . . as they may reasonably request" and permits the  
 9 play's creators "to dramatize and/or fictionalize events and incidents in your life and  
 10 the manner in which you are depicted; to use, change, adapt or elect not to use the  
 11 Materials as we may determine; and to make any other changes to the Materials and  
 12 the Works as we may, in our sole discretion, deem inappropriate." (See Exhibit "A"  
 13 hereto.)

14 Thus, by its plain terms, the granting language in the 1999 Letter Agreement  
 15 merely conveys the right to use DeVito's and Massi's names, likenesses and life story  
 16 rights.<sup>6</sup> These are rights Plaintiff's counsel himself has publicly asserted must be  
 17 obtained in order for a play about The Four Seasons to depict actual members of the  
 18 group. *See* Greg Gulliot's 08/16/06 message to the chat group on the fan website,  
 19 "Frankie Valli and The Four Seasons" (for convenient reference, copy attached hereto  
 20 as Exhibit "B").

21 If the 1999 Letter Agreement was actually intended to assign DeVito's  
 22 copyright interest in the Autobiography, it would have, at a minimum, specifically

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24         <sup>6</sup> The language in the 1999 Letter Agreement parallels the grant of life  
 25 story rights language discussed in and attached as an Appendix to the *Marder v. Lopez*  
 26 opinion, 450 F.3d at 454-55 (Marder agrees to provide research, interviews and other  
 27 services in connection with the preparation of a screenplay and grants the right to use  
 28 such services and "the story of Marder's life and her experiences as a dancer, and such  
 uses may be factual and/or fictional with the right to make such changes therein and  
 thereto as [producers] in their sole discretion may determine in connection with said  
 motion picture FLASHDANCE. . .").

1 identified the manuscript so there could be no misunderstanding of the property being  
 2 conveyed to Gaudio and Valli. In addition, since DeVito had secured a copyright  
 3 registration for the Autobiography in 1991 (SAC ¶ 42 & Ex. 21), the 1999 Letter  
 4 Agreement undoubtedly would have made specific reference to this copyright  
 5 registration if DeVito's copyright interest was being transferred. Indeed, both the  
 6 copyright registration and a copy of the manuscript would have been attached to and  
 7 made part of the 1999 Letter Agreement if that document was supposed to assign to  
 8 Gaudio and Valli all of DeVito's copyright interest in the Autobiography. The 1999  
 9 Letter Agreement does none of those things. It clearly does not state or suggest that  
 10 DeVito is assigning to Gaudio and Valli any copyright interest he may have in the  
 11 Autobiography and, under the settled law discussed above, such a fundamental grant  
 12 of rights cannot simply be implied or assumed to be included within the term  
 13 "Materials," especially when that term's definition does not identify any copyright  
 14 interest, any copyright registration or the Autobiography.

15 Plaintiff also might rely on the word "copyright" in the waiver section of the  
 16 1999 Letter Agreement. But that paragraph, on its face, constitutes a broad waiver of  
 17 any possible claim by DeVito and Massi "in connection with the Materials or Works  
 18 including, but not limited to any claim that the Works libel, slander, or defame you or  
 19 violate any right of privacy, publicity, confidentiality, copyright or other personal or  
 20 property right." A waiver or release of an infringement claim is not the same as an  
 21 assignment of copyright ownership. *Davis v Blige*, 505 F.3d 90, 102 (2<sup>nd</sup> Cir. 2007)  
 22 ("Licenses and assignments function differently from settlements and releases. . .").

23 The fact that the 1999 Letter Agreement both grants life story rights and waives  
 24 the right to sue on various claims including copyright infringement, does not  
 25 transform the document into an assignment of copyright ownership or an exclusive  
 26 license of copyright interests. The recent case of *Marder v. Lopez, supra*, is  
 27 instructive. There, the plaintiff dancer sold her life story rights to Paramount and  
 28 cooperated with a writer who created the screenplay for the motion picture

FLASHDANCE. Analogously to the instant case, the plaintiff signed a document that both granted to Paramount her life story rights to make a movie and waived various claims arising out of creation of the movie. 450 F.3d at 447. Plaintiff subsequently sued when she saw that Sony, under an apparent license from Paramount (but without her consent), was using elements from FLASHDANCE in an unrelated music video. The district court granted the defendant's motion to dismiss under Rule 12(b)(6) after reviewing plaintiff's life story release with Paramount. The Ninth Circuit affirmed finding that it is typical for entertainment companies involved in making a project based on a real person to secure a document that both grants life story rights and releases claims that might arise from the project. *Id.* at 452 ("As Paramount points out, it is generally recommended that a party seeking to acquire life story rights for use in a motion picture include both [waiver of claims and grant of rights] clauses in such an agreement. *See Jay S. Kenoff*, 1-5 Entertainment Industry Contracts Form 5-1 ¶¶ 1-2 (Donald C. Farber, ed., Matthew Bender & Co., Inc. 2004).")

Because the 1999 Letter Agreement, on its face, constitutes a waiver of claims and a grant of life story rights -- not an assignment of or exclusive license to any copyright interest DeVito might hold in an undisclosed manuscript -- Plaintiff's 13<sup>th</sup> and 14<sup>th</sup> Counts should be dismissed as a matter of law. *See, eg., Konigsberg v. Rice*, 16 F.3d at 356 (affirming motion to dismiss after finding purported transfer document insufficient under Section 204(a)); *Effects Associates*, 908 F.2d at 559 (finding no transfer of copyright ownership as a matter of law); *Radio Tel. Espanola S.A. v. New World Entertainment, Ltd.*, 183 F.3 922, 927-29 (9<sup>th</sup> Cir. 1999) (affirming summary judgment against plaintiff claiming transfer, for failure to "satisfy" the requirements of Section 204(a)).

### III. CONCLUSION

Plaintiff's non-copyright claims (Counts 13 and 14) depend solely on the contention that the 1999 Letter Agreement constitutes an assignment or exclusive

1 license of 100% of Tommy DeVito's ownership interest in his Autobiography. This  
2 Motion demonstrates that the 1999 Letter Agreement, as a matter of law, cannot  
3 satisfy the requirements under Section 204 of the Copyright Act for a writing that  
4 actually conveys ownership of a copyright interest. Because Plaintiff cannot show  
5 that DeVito transferred his ownership interest to any defendant, Counts 13 and  
6 14 cannot state a claim and must be dismissed with prejudice.

7  
8 DATED: April 23, 2009  
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12  
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INC., DODGER THEATRICALS, LTD.  
and JB VIVA VEGAS, L.P.

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## **EXHIBIT A**

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## EXHIBIT A

Robert Gaudio and Frankie Valli  
c/o Peter C. Bennett, Esq.

Beverly Hills, California 90210

Dated as of \_\_\_\_\_, 1999

Mr. Nicholas Macioci  
West Orange, New Jersey 07052

Mr. Thomas Devito  
c/o J.R. Reilly  
Henderson, Nevada 89014

### Re: "The Four Seasons"

Dear Nicky and Tommy:

For One Dollar (\$1.00) and other good and valuable consideration, receipt of which is hereby acknowledged, the parties agree as follows:

We are presently contemplating entering into an agreement which would authorize the creation of a musical stage play based on the life and music of "The Four Seasons" (the "Play"). In connection with the Play, the authors of the play may wish to use or incorporate certain aspects of your life related to The Four Seasons including, by way of example, your creative contributions, biographies, events in your life, names and likenesses (the "Materials"). In consideration of our right to use such Materials, as more fully set forth below, you shall be entitled to the following:

(a) One-fourth (i.e., 25%) of the royalty actually paid specifically for the underlying rights as a whole ("Your Royalty Share"), subject to the same waivers, deferrals and royalty pool calculations as are applicable to us in our capacity as underlying rights holders, provided we shall not enter into an agreement for the underlying rights in which the royalty allocated to underlying rights is less than one-third the aggregate royalty allocated to the book, music and lyrics of the Play without your approval. By way of example only, if 6% of the gross weekly box office receipts ("GWBOR") is paid for

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the book, music and lyrics of the Play, the underlying rights shall receive no less than 2% thereof, and you shall be entitled to receive 0.5% thereof. By way of further example, if the book, music and lyrics are allocated 15.6% of weekly operating profits in a royalty pool, the underlying rights shall be allocated no less than 5.2% thereof, and you shall be entitled to receive 1.3% thereof. Your Royalty Share shall be divided between you as follows: 80% to Thomas Devito and 20% to Nicholas Macioci. You will further be entitled to one-fourth of the subsidiary rights income payable to us in our capacity as underlying rights holder, which amount shall be divided between you in the same ratio as applicable to the royalty, provided we shall not enter into an agreement in which the author's share of subsidiary rights allocated to underlying rights is less than one-fourth the entire author's share without your approval. By way of example only, if the author's share of stock and amateur advances is \$600,000 (net of agency fees and commissions), underlying rights shall receive no less than \$150,000 thereof, and you shall be entitled to receive \$37,500 thereof. You shall not be entitled to share in subsidiary rights income derived from the Play or in royalties paid or received for any purpose other than in connection with the underlying rights (such as royalties which may be paid for writing services, or for music or lyrics);

(b) One-fourth (i.e., 25%) of the advance actually paid specifically for the underlying rights, to be divided equally between you. By way of example only, if a \$30,000 advance is paid for the underlying rights, you shall receive \$3,750 each. You shall not be entitled to share in monies paid or received for any purpose other than the underlying rights;

(c) \$10,000 of the advance actually paid specifically for underlying rights, such advance to be paid entirely to Nicholas Macioci.

In consideration of the foregoing payments, you grant to us the exclusive right to use and incorporate the Materials in one or more theatrical productions, and any and all ancillary and subsidiary exploitations thereof including, without limitation, cast albums, motion picture and televised versions, merchandise and/or other works (collectively, "Works"). We shall further have the right to use the Materials in the advertising, publicity and promotion of the Works. You hereby consent to any such use

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and agree that the Works may be exploited throughout the world in all media now existing or later devised, and you further acknowledge that you will not receive any compensation for the use of the Materials or in connection with any of the Works other than the compensation expressly set forth herein. The rights granted by you to us hereunder shall continue in perpetuity if the rights in the Play have merged with each other pursuant to the production contract between us and the initial commercial producer. If the rights of the initial commercial producer lapse prior to merger, and we enter into a production contract with another commercial producer within two (2) years following such lapse of rights, our rights hereunder shall continue only for the duration of such subsequent producer's rights, and in perpetuity if merger has occurred pursuant to our production contract with such subsequent producer.

Without limitation of the foregoing, we shall have the right, but not the obligation, to use the Materials in any manner which we see fit including, without limitation: to depict you or create or develop a character or characters based on you either in whole or in part; to dramatize and/or fictionalize events and incidents in your life and the manner in which you are depicted; to use, change, adapt or elect not to use the Materials as we may determine; and to make any other changes to the Materials and the Works as we may, in our sole discretion, deem appropriate.

You waive any right to inspect or approve the Works or any use of the Materials in connection therewith. You further waive any claim in connection with the Materials or Works including, but not limited to, any claim that the Works libel, slander or defame you or violate any right of privacy, publicity, confidentiality, copyright or other personal or property right.

In addition to the foregoing, the bookwriters of the Play, or their designees, agree to interview you, and you agree to make yourselves available for such interviews by the bookwriters, or their designees, as they may reasonably request.

The rights granted to us herein are irrevocable, and not subject to rescission or injunction under any circumstances. In the event of a breach by us, your sole remedy shall be an action at law for damages actually

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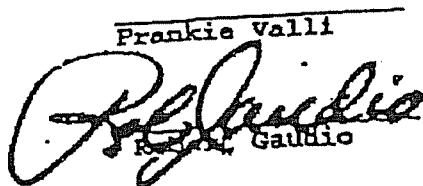
suffered; in no event shall you have the right to seek injunctive relief or to enjoin or restrain or otherwise interfere with the exploitation, production, distribution or exhibition of the Play or the Works.

We shall have the unrestricted right to assign this agreement in whole or in part. This agreement shall inure to our benefit and the benefit of our licensees, successors, designees and assigns. It shall be binding upon you, your heirs, executors, administrators, representatives and assigns and shall be governed by the laws of the State of New York.

This agreement is intended to expand and not limit the rights granted to us pursuant to previous agreements between the parties. You acknowledge there are no assurances that the Play will be produced or that any royalties, subsidiary rights income or other monies will be received by us and paid to you. You further acknowledge that, other than as expressly set forth herein, no promises have been made to you, nor have you relied on any prior representations in entering into this agreement.

If the foregoing is acceptable, please countersign this letter where indicated.

very truly yours,

Frankie Valli  
  
 Frankie Valli  
 Nicholas Gaudio

AGREED AND ACCEPTED:

  
 Nicholas Macioci  
 Thomas DeSisto  
 Thomas Davito

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## **EXHIBIT B**

I didn't know about the DVD of videos! That will make it worthwhile. Maybe I missed that part of the discussion - I've been out of town!

Regards,

Greg

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Message #5260 Mon Aug 28, 2006 1:14 am  
RE: [FrankieVallilandTheFourSeasons] Definitive Pop: Frankie Valli & The Four Seasons

This too is disappointing. It's actually something less than In Season, which is still very much in print. They keep releasing Greatest Hits packages that are virtually identical! Where's the value-added stuff?

Can you tell us more about the 4 CD boxed set? I hope it has GILG on it! I know we can't get rights to the Motown stuff for a compilation, but for goodness sake, there's lots of other material to draw from that the Seasons partnership does own.

Greg

---

Message #5259 Mon Aug 28, 2006 1:09 am  
RE: [FrankieVallilandTheFourSeasons] Re: Definitive Pop: Frankie Valli & The F...

That's a little disappointing - I thought we were getting new material! Personally, I don't want to hear Frankie doing hits of others, even if they sound good. Not Frankie's fault obviously - he is not a writer. But I'm disappointed in Bob. Come on Bob, you can still write songs!!!!

Greg

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Message #5226 Wed Aug 23, 2006 6:27 pm  
RE: [FrankieVallilandTheFourSeasons] Four Seasons Bowling Alley Union NJ

According to my legal database, there is no Four Seasons bowling alley in the entire state of New Jersey, much less one in Union, New Jersey.

I think the days of independent bowling alleys are well over - the big companies bought up the independents long ago.

Greg

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Message #5200 Wed Aug 16, 2006 7:45 am  
RE: [FrankieVallilandTheFourSeasons] Re: Comments

outstanding.

The play is fantastic, and is a four-Tony-award-winner. It is the best musical Broadway currently has on offer. That is significant. I hope to see the play for the second time in September. I have little interest in seeing the Jersey Boys perform on the Today show or something like that, however. I've seen their appearances, and they don't do too much for me in that context. They are no Four Seasons. But the play is great and they are fantastic in it, and the performances they give on stage for the play are

There's a difference between assessing the Jersey Boys' capacity to be a credible, stand-alone, live musical act, and assessing the merits of the play, which is more than just a Beatmania-type presentation of sound-alike reproductions of Four Seasons classics.

RE: [Frankie Valli and The Four Seasons] RE: Great Jersey Boys review  
Message #5163 Sat Aug 5, 2006 8:06 pm

Greg

Well-established at common law. Fortunately, it doesn't appear there is any problem here -- Tommy has been quoted as saying he's happy with the checks coming in. Believe me, if the checks weren't coming in, Tommy wouldn't be happy, and would have a right to be unhappy, and might well end up with more money than he's getting now if he had to sue to enforce his rights! Moreover, because the right of publicity is heritable, Nick's estate has a right to his share. The same could be said of anyone whose name or likeness is used in a play. Now, the amount of the compensation due is not set by law, but the right exists, and had to be accommodated. One can't make a play about someone and not give that person money - believe me!

They would have a right to sue and receive compensation, just as Elvis Presley's estate and Princess Diana's estate do when products and programs use their names and likenesses. This "right of publicity" is well-established at common law. Fortunately, it doesn't appear there is any problem here -- Tommy has been quoted as saying he's happy with the checks coming in. Believe me, if the checks weren't coming in, Tommy wouldn't be happy, and would have a right to be unhappy, and might well end up with more money than he's getting now if he had to sue to enforce his rights! Both have "rights of publicity" which they exploited during their lifetimes - rights to the use and exploitation of their names and likenesses, and both of their names and likenesses are used in the play. If they were not paid,

Tommy and Nick's estate are entitled to compensation as a matter of law. Nick's estate, and that fact really doesn't tell us anything about them - of their hearts that Frankie and Bob have to give money to Tommy and to b) Although they may well have kind hearts, it's not from the kindness

a) I'm going back to New York to see it a second time with a friend, on Saturday, September 23rd - I can't wait. I hope I get JLY this time, rather than Dominic Nolfi. I know JLY has been ill, but is now back.

Speaking of Jersey Boys . . .

## **PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is **2049 Century Park East, Suite 3110, Los Angeles, California 90067-3274**.

On April 23, 2009, I served the foregoing document described as **MOTION NO. 3: MOTION BY NEW DEFENDANTS TO DISMISS COUNTS 15 THROUGH 17 OF PLAINTIFF'S SECOND AMENDED COMPLAINT UNDER RULE 12(b)(6); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** on the interested parties in this action.

- by placing the original and/or a true copy thereof enclosed in (a) sealed envelope(s), addressed as follows:

**SEE ATTACHED SERVICE LIST**

- BY REGULAR MAIL:** I deposited such envelope in the mail at 2049 Century Park East, Suite 3110, Los Angeles, California 90067-3274. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

**BY FACSIMILE MACHINE:** I transmitted a true copy of said document(s) by facsimile machine, and no error was reported. Said fax transmission(s) were directed as indicated on the service list.

**BY ELECTRONIC MAIL:** I transmitted a true copy of said document(s) by electronic mail, and no error was reported. Said electronic mail(s) were directed as indicated on the service list.

**BY OVERNIGHT MAIL:** I deposited such documents at the Federal Express Drop Box located at 2049 Century Park East, Suite 3110, Los Angeles, California 90067-3274. The envelope was deposited with delivery fees thereon fully prepaid.

**BY PERSONAL SERVICE:** I caused such envelope(s) to be delivered by hand to the above addressee(s).

(Federal) I declare that I am employed in the office of a member of the Bar of this Court, at whose direction the service was made. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 23, 2009, at Los Angeles, California.

Maureen Johnson

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